APPENDIX A

[Filed Nov. 12, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6959

ALUMINUM COMPANY OF AMERICA,
Petitioner,

versus

U.S. DEPARTMENT OF LABOR and DIRECTOR,
OFFICE OF WORKERS COMPENSATION PROGRAMS;
ESTHER JONES (widow of Charles Jones),
Respondents.

Petition for Review of an Order
of the Benefits Review Board

Before TJOFLAT, EDMONDSON, and BARKETT, Circuit Judges.

BY THE COURT:

Petitioner's petition for rehearing, construed as a motion for reconsideration of this Court's April 30, 1998, order that dismissed its petition for review for lack of jurisdiction, is DENIED.

The following action has been taken in the referenced case:

- The enclosed order has been ENTERED.
- No further action will be taken.

Sincerely,

/s/ Thomas K. Kahn
THOMAS K. KAHN
Clerk

APPENDIX B

[Filed Apr. 30, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6959

ALUMINUM COMPANY OF AMERICA,
Petitioner,

versus

U.S. DEPARTMENT OF LABOR and DIRECTOR,
OFFICE OF WORKERS COMPENSATION PROGRAMS;
ESTHER JONES (widow of Charles Jones),
Respondents.

Petition for Review of an Order
of the Benefits Review Board

Before TJOFLAT, EDMONDSON, and BARKETT, Circuit Judges.

BY THE COURT:

Respondent Jones' motion to dismiss this petition for review for lack of jurisdiction is GRANTED. The Benefits Review Board's October 16, 1997, order that vacated the Administrative Law Judge's (ALJ's) order denying a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50, and remanded the case to the ALJ is not a final decision. *See* 33 U.S.C. § 921(c); *Jacksonville Shipyards, Inc. v. Estate of Verderane*, 729 F.2d 726 (11th Cir. 1984).

APPENDIX C

Date Issued: Oct. 16, 1997

U.S. DEPARTMENT OF LABOR
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 97-287

ESTHER JONES
(Widow of CHARLES JONES),
Claimant-Petitioner
v.

ALUMINUM COMPANY OF AMERICA
Self-Insured
Employer-Respondent

DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-2055) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*

(the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for employer from July 1972 until his illness and death in March 1980 caused by carcinoma of the left lung with metastasis to the brain. From July 1972 through November 12, 1978, decedent worked as a millwright welder, and thereafter he worked as a general mechanic. Cl. Exs. 13, 20. His duties as a millwright welder required him to perform cutting, welding, fusing and heating operations to install, maintain, repair and service machinery at employer's plant.[1] Emp. Ex. 12. As a general mechanic, a category to which all the maintenance-type workers were changed in 1978, decedent was required to "construct, install, maintain, repair, and service all types of equipment, machinery, structures, ducting, and piping systems." Emp. Ex. 11. Claimant contends decedent was exposed at employer's facility to asbestos which contributed to his death. Claimant and her five children filed claims for death benefits. Cl. Exs. 2, 7.

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[1] Employer's facility converted bauxite into calcine alumina, otherwise known as aluminum oxide, which would later be used to produce aluminum. Tr. at 37. Shipments of bauxite were unloaded at the State Port Authority docks and placed on Conveyor A, which was owned and maintained by the state of Alabama. Bauxite destined for employer's facility dropped from Conveyor A to Conveyor B, which was owned and operated by employer and most of which was on employer's property. From Conveyor B; the bauxite would travel to Conveyor C where it would then travel to one of two storage buildings. Emp. Ex. 13; Tr. at 33-35. When employer needed the bauxite in the manufacturing process, workers would bulldoze it through trap doors in the floor of the storage buildings which led to underground conveyor belts. Tr. at 36; *se also Garmon v. Aluminum Company of America-Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995).

The administrative law judge addressed only one issue in his decision. He concluded that decedent's job as a millwright welder and general mechanic did not satisfy the Section 2(3), 33 U.S.C. § 902(3), status requirement. Specifically, he found that decedent's work maintaining Conveyor B did not meet the definition of maritime employment because it was not an integral part of loading or unloading a vessel. Decision and Order at 7. The administrative law judge stated that when the bauxite spilled from Conveyor A to Conveyor B it came into possession of the ultimate user for manufacturing purposes and, therefore, it was no longer in the unloading process.

Claimant appeals the administrative law judge's decision, arguing that decedent was engaged in maritime employment by virtue of his work on the conveyor belts and work to which he may have been assigned on the alumina loading dock and the liquid caustic dock.[2] Employer responds, urging affirmance of the administrative law judge's denial of benefits because claimant failed to establish decedent's maritime status.[3] For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee's work

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[2] The plant's final product, alumina, was moved to the barges for maritime transportation via a conveyor belt called a "gravity conveyor" or an "airslide." The liquid caustic arrived at employer's facility on a barge and was off-loaded by way of a pump and pipeline. Tr. at 60-61, 107-108.

[3] Employer has filed a Statement for Oral Argument before the Board *en banc*. We deny employer's motion, as it was not filed in the proper form pursuant to Section 802.219(b) of the regulations. 20 C.F.R. § 802.219(b). Moreover, we conclude that oral argument is unnecessary to resolve the issue in this case. 20 C.F.R. § 802.219. Further, we decline to address the additional issues employer raises in its response brief because, as claimant asserts, they were not addressed by the administrative law judge. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990)

is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§ 902(3), 3(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act.[4] *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996).

Generally, an employee satisfies the "status" requirement if he is engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. § 902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, he must "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. Although an employee is covered if some portion of his activities constitutes covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990).

Decedent worked as a millwright welder and a general mechanic for employer. A millwright welder works in tandem with a millwright. Mr. House, a co-worker who was a millwright, testified that he and decedent repaired and maintained conveyor belts, specifically the bauxite

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[4] The parties agree that employer's facility constitutes a maritime situs under Section 3(a). Decision and Order at 2, 4.

system (Conveyors B and C), changing rollers, head pullers, adjusting belts, and oiling and maintaining rollers. He stated they also changed motors and repaired pumps, working in the power house, the plant, near the digesters and boilers, and on machinery between the water and the plant. Cl. Ex. 22; Tr. at 82, 84-88. Other co-workers, Mr. Simon and Mr. Howard, confirmed decedent's work on the bauxite conveyor system, but neither knew whether decedent worked on the liquid caustic or alumina docks. Jt. Ex. 1 at 14, 24-25, 35; Jt. Ex. 2 at 20, 43-44, 46-48.

According to Mr. Hartwell, a former plant manager, repair work of the conveyor systems was a "regular part" of a millwright's, and later a general mechanics's, job. Specifically, he stated that although a millwright/general mechanic was responsible for maintaining and repairing the conveyor belts, and that a welder would accompany the millwright, this would involve approximately one percent or less of the millwright welder's work. Tr. at 72-75. With regard to the dock activity, Mr. Hartwell testified that the general mechanic's duties included observing the discharge of liquid caustic and maintaining the alumina conveyor but that this constituted less than two percent of a general mechanic's work. Tr. at 61-63, 75-76.

In this case, the administrative law judge acknowledged the three possible work areas where decedent's duties could confer coverage under Section 2(3): the bauxite conveyors, the alumina dock and the caustic dock. He then noted claimant's contention that decedent could have been and actually was assigned to work in all three areas. Decision and Order at 4. The administrative law judge determined that decedent could have spent approximately one percent of his time repairing Conveyor B, but that there is "no suggestion" that he ever worked on the alumina or caustic docks. He then concluded that decedent's duties as to Conveyor B were not integral to the unloading process but were analogous to the truck driver's duties as discussed by the Supreme Court in *Caputo*. *See* discussion, *infra*.

Specifically, the administrative law judge found that when the bauxite spilled from Conveyor A to Conveyor B, it came into the possession of the ultimate user. Decision and Order at 7. Thus, he found that the transition from the "unloading" process to the "manufacturing" process occurred once the bauxite left Conveyor A.

Claimant alleges error in this finding, and asserts that this case is controlled by the Board's decision in *Garmon v. Aluminum Co. of America—Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995). In *Garmon*, the claimant was a bulldozer operator for ALCOA who bulldozed bauxite into piles in the storage buildings and pushed the piles through the trap doors for transport on the underground conveyor system. The claimant also removed scrap iron from the above-ground conveyor belts leading to the storage buildings and replaced bauxite which had fallen from the same conveyor belts. *Garmon*, 28 BRBS at 47. The administrative law judge found, and the Board affirmed, that the claimant's bulldozing duties in the storage buildings were insufficient to confer coverage. However, the Board held there was testimony which, if credited, could establish that the claimant performed covered work "since ensuring that the conveyor belts leading from the ships to the storage facility continued operating entails part of the 'overall unloading process' . . . ." *Id.* at 49. Therefore, because the administrative law judge had not considered that aspect of the claimant's duties, the Board remanded the case for him to address whether the testimony established that the claimant performed work on the conveyor belts "which constituted part of the unloading process and which is covered under the Act." *Id.* at 50. On reconsideration, the Board reaffirmed its decision to remand the case for the administrative law judge to consider the claimant's conveyor belt duties. *Garmon*, 29 BRBS at 15.

In stating that maintenance and repair of the conveyor belts leading from the ships to the storage buildings con-

stitute covered employment, the Board relied on the Supreme Court's decision in *Schwalb*. In that case, the Supreme Court stated:

> Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires.

Schwalb, 493 U.S. at 47, 23 BRBS at 99 (CRT); *Garmon*, 28 BRBS at 49-50. The Court stated that the determinative consideration is whether the ship loading/unloading process could continue without the claimant's function, and it noted that it is irrelevant whether the employee may have other duties unconnected to loading or unloading or whether his contribution to the loading process is not continuous. *Id.*; *see also Ford*, 444 U.S. at 82, 11 BRBS at 328; *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165.

In *Caputo*, the Supreme Court held that employees who were hired as terminal labor from the hiring hall, when there was no work for their regular stevedoring crew, and who could be assigned to any number of tasks on the waterfront, are covered employees if they are "engaged in the final steps of moving cargo from maritime to land transportation: putting it in the consignee's truck." *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165. Thus, claimant Caputo, who was loading trucks with discharged cargo sitting on the docks when he was injured, was covered by the Act. *See also Ford*, 444 U.S. at 82, 11 BRBS at 328 (coverage conferred on those involved in the intermediate steps of moving cargo between ship and land transportation). In addressing the language of the Act, the Court distinguished Caputo's job from that of a truck driver, who was merely responsible for picking up or delivering cargo "unloaded from or destined for maritime trans-

portation." *Caputo*, 432 U.S. at 267, 6 BRBS at 161; *see also Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987).

The administrative law judge in the instant case likened decedent's work to that of the truck driver because the administrative law judge found that the bauxite had come into the possession of the ultimate consumer when it reached Conveyor B and therefore was no longer in the unloading process. Initially, we hold that the administrative law judge erred in establishing a boundary between Conveyor A and Conveyor B on the ground that the Port owns and maintains Conveyor A and employer owns and maintains Conveyor B. He found that bauxite which spilled from Conveyor A to Conveyor B "was now in the possession of the ultimate user" and was no longer in the unloading process. Decision and Order at 7. The Board has held that when raw materials are unloaded from a ship at a manufacturing plant and are refined or used in a manufacturing process, loading activities are complete upon the delivery of the goods to the plant. *Conye v. Refined Sugars, Inc.*, 28 BRBS 372 (1994); *see also Prolerized New England Co. v. Benefits Review Board*, 627 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981). Thus, in *Garmon*, the Board held that the unloading process was complete when the bauxite was received for storage because it is at this point that the product has reached the consumer and is not stored for further transhipment. *Garmon*, 28 BRBS at 49; *see generally Caputo*, 432 U.S. at 277-278, 6 BRBS 168-169 (rejecting "point of rest" theory). The Board stated, however, that ensuring the continued operation of the conveyor belt leading from the ships to the storage facility is part of the overall unloading process, *Garmon*, 28 BRBS at 49-50, *citing Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT), and it remanded the case for consideration of the evidence regarding whether the claimant maintained the conveyor belts.

Contrary to the administrative law judge's finding, the situation herein is not analogous to the truck driver analysis in *Caputo*. There, the Court stated that a driver whose job was to load and carry cargo which had been stored for further transshipment over land was not a covered employee. *Caputo*, 432 U.S. at 267, 6 BRBS at 161; *cf. Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168 (CRT) (3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984) (employee who helps deliver cargo from initial point of rest on docks to storage area is covered despite paper transfer of ownership at the point of rest); *Warren Brothers v. Nelson*, 635 F.2d 552 (6th Cir. 1980) (truck driver injured while transporting gravel unloaded from barges to storage pile was integral to unloading process). By contrast, the court found that employees such as claimant Caputo, who was loading the truck, are engaged in steps in the loading process and thus covered until the process is complete regardless of whether the cargo is containerized or whether it halts at a point of rest on the dock.

In this case, although the primary purpose of employer's facility was to process alumina, the work at issue involves maintenance of the conveyors which transported bauxite from the ships to employer's storage facility for later use in the manufacturing process. Thus, the conveyor system did not move stored cargo, but instead moved shipped cargo that was still in the unloading process.[5] *See Prolerized New England Co. v. Miller*, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982) (worker who maintains conveyor belt and "stacker" which are integral to loading the product onto ships is covered). Given the holding of

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[5] The testimony of record implies that movement of the bauxite on the conveyor system between the ships and the storage building was a continuous process. Jt. Ex. 2 at 41, 44; Tr. at 58. Thus, Conveyors A, B and C are all integral to the unloading of bauxite, as this material travels on all conveyors prior to reaching the storage facility.

Schwalb that maintenance of loading equipment is covered, decedent's duties in this case are analogous to those of claimant Caputo, rather than to those of the truck driver who moved the goods on their landward journey. Accordingly, we hold that the administrative law judge erred in stating that the loading process ended once the bauxite left Conveyor A, and consistent with *Schwalb*, *Caputo* and *Garmon*, we hold that the loading process did not end until the raw material reached the storage facility.

We next address whether decedent spent a sufficient amount of his time engaged in maintenance of the conveyor belts, as employer contends that any time decedent spent in this activity is legally insufficient to confer coverage. *See generally King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983). While *Caputo* states that only "some" of an employee's time need be spent in covered activities to confer status, those activities must be more than merely episodic. An "episodic" activity is one which is "discretionary or extraordinary" as opposed to one which is "a regular portion of the overall tasks to which a claimant may be assigned. . . ." *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984); *see also McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). In *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732, an employee who spent 2.5 to five percent of his work time unloading ships without assistance and "some" additional time with assistance was held covered by the Act under the "some of the time" test of *Caputo*. In *McGoey*, the Board held that an employee who spent three to five percent of his time supervising the unloading of ships "spent at least some of his time engaged in the unloading process." *McGoey*, 30 BRBS 239. Moreover, the claimant was covered because this activity, while infrequent, was nonetheless a non-discretionary, regular portion of his job. *Id.; see generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). Similarly, in *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997), the Board held that the administra-

tive law judge's finding that the claimant worked one to two percent of his time in either ship repair or cargo handling was sufficient to establish the claimant's maritime status. Specifically, the Board held that these duties "were a regular portion of the overall task to which claimant could be, and actually was, assigned" and were not too episodic to confer status simply because of their infrequency. *Lewis*, 31 BRBS at 40-41; *see generally Lennon*, 20 F.3d at 660-661, 28 BRBS at 24 (CRT).

Decedent's job description was broad, encompassing service on "all types of equipment," and the administrative law judge noted Mr. Hartwell's testimony that employees with decedent's job classification could spend about one percent of their work repairing and maintaining the conveyor belts. Although the maintenance of the conveyor belts was infrequent pursuant to the credited testimony of Mr. Hartwell, this work nevertheless confers coverage under the Act because it was a regular, non-discretionary part of the job. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT). As the administrative law judge found that decedent could have been and actually was assigned to work on the bauxite conveyor about one percent of his time, Decision and Order at 7, we reverse his conclusion that such work was not covered employment.[8] *Lewis*, 31 BRBS at 40-41.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated. The case is remanded to the administrative law judge for consideration of the remaining issues raised by the parties.

SO ORDERED.

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[6] Because we conclude that decedent's work on employer's bauxite conveyor system constitutes covered employment, we need not address claimant's contentions regarding alleged work performed on the alumina or liquid caustic docks.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. MCGRANERY
Administrative Appeals Judge

APPENDIX D

Date: Oct. 3, 1996

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 300, Commerce Plaza
603 Pilot House Drive
Newport News, Virginia 23606

Case No.: 95-LHC-2055
OWCP No.: 6-158747

In the Matter of
ESTHER JONES
(Widow of Charlie Jones, Jr.),
Claimant,
v.
ALCOA,
Employer.

BEFORE: Richard K. Malamphy, Administrative Law Judge.

DECISION AND ORDER—DENYING BENEFITS BASED ON A LACK OF STATUS UNDER SECTION 2(3) OF THE ACT

This proceeding arises from a claim filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended 33 U.S.C. 901 *et seq.*

A formal hearing was held, in Mobile, Alabama, on December 6, 1995, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the

arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

PRELIMINARY MATTERS

At the hearing, CX 1-28, EX 1-14, and JX 1 and 2 were entered into the record. CX 24, the transcript of a January 1996 deposition of Dr. Lorino, was submitted post-hearing.

No other exhibits have been submitted since the hearing in December 1995.

STIPULATIONS [1]

The parties have stipulated to the following:

1. From 1972 through 1980, Charlie Jones worked for Alcoa as a millwright welder and later as a general mechanic.
2. The Alcoa plant sits on the Mobile River, which is a navigable waterway.

ISSUES

1. Jurisdiction under the Longshore and Harbor Workers' Compensation Act;
   A. Situs
   B. Status
2. Whether Mr. Jones had asbestosis;
3. Whether asbestosis, if present, is related to asbestos exposure with Alcoa;
4. Whether asbestosis played a part in the fatal lung cancer; and

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[1] The following abbreviations will be used as citations to the record:

EX—Employer's Exhibits;
CX—Claimant's Exhibits;
JX—Joint Exhibits; and
TR—Transcript of the hearing.

5. Whether Alcoa is entitled to relief under Section 8(f) of the Act.

JURISDICTION UNDER THE ACT

In order for a claimant to be eligible for benefits, the LHWCA, as it was amended in 1972, requires an injured worker to qualify under both a situs test and a status test. *Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). That is, the injury must occur upon the navigable waters of the United States as defined by the Act, and the claimant must have the status of an employee as defined in the Act.

Prior to the 1972 Amendment of the Act, a worker injured upon navigable waters was covered by the Act without an inquiry into what he was doing at the time of his injury. A Longshore or harbor worker injured on the landward side of the dock, however, could not collect LHWCA benefits, and was left with state workers' compensation benefits as his sole remedy. The 1972 Amendment added the status test, extending LHWCA coverage to "maritime employees" who perform their duties on land areas adjoining the navigable waters. *See* 33 U.S.C. § 902(3). Maritime workers were thus permitted to collect under the LHWCA even if they were injured on land, so long as they satisfied the following two part "status and situs" test:

> (1) *Status*—the worker must be a maritime employee, such as a longshoreman, shipbuilder, or ship repairman engaged in loading, unloading, constructing, or repairing a vessel of at least eighteen net tons in size. *See* 33 U.S.C. § 902(3).
>
> (2) *Situs*—the worker's injury must occur on navigable waters of the United States, or on a coterminous dry dock, pier, wharf, terminal building, marine railway "or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." *See* 33 U.S.C. § 903(a).

The Supreme Court held in 1983 that Congress did not intend to withdraw any coverage when it passed the 1972 Amendment, which added the status requirement and expanded the situs definition. Therefore, any worker injured on navigable waters could claim under the LHCWA regardless of whether he met the statute's "status requirement of being a 'maritime employee.'" *Director, Office of Workers' Compensation Programs v. Perini N. River Assoc.*, 459 U.S. 297 (1983).

Thus, if a worker is injured on a navigable water situs, he need only show that he works for a maritime employer in order to be eligible for LHWCA benefits. If the same worker is injured, instead, on an adjoining dock, pier, wharf, dry dock or loading area, he must also prove that his particular job is of a "traditionally maritime" status; or connected to ship-loading, shipbuilding, ship-repairing, etc., to claim LHWCA eligibility.

In *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40 (1989), the Supreme Court reiterated its holding from *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), that land-based work may constitute maritime employment, and accordingly, be subject to the jurisdiction of the LHWCA, if the employee was involved in the essential or integral elements of the loading or unloading process. *Schwalb*, 493 U.S. at 46; *see also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

Situs has not been contested in this case as the "alleged injury" occurred while the Claimant was working at a site bordering on a navigable waterway.

The Claimant focuses on the testimony of Ray Hartwell, the former plant manager, in arguing that the status requirement has been met. It is contended that Alcoa had three areas which were Longshore Act covered operations and these were the bauxite conveyors, the alumina dock, and the caustic dock. Reportedly, Mr. Jones could be assigned to these areas, and he actually worked in each of these areas.

The Claimant states that the statements of Messrs. Simon, House, and Howard support this contention. In addition to the U. S. Supreme Court cases mentioned previously, counsel cites *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611 (11th Cir. 1990), *Boudlouche v. Howard Trucking Company, Inc.*, 632 F.2d 1346 (5th Cir. 1980), and *Garmon v. Alcoa*, 28 BRBS 46 (1994).

The Employer states that:

> Claimant's case relies heavily on testimony that Decedent was employed as a millwright at Alcoa and, as such, could be required to maintain various conveyor systems used to transport bauxite throughout the manufacturing process at Alcoa. Apparently, Claimant contends this employment was an integral part of vessel loading or unloading. The Employer argues that the occasional work with respect to the Alcoa conveyor system does not support a finding of jurisdiction under the Act. As a millwright, while Decedent could have performed repairs to the Alcoa conveyors on a sporadic basis, this was not regular employment and certainly not integral to ongoing vessel loading or unloading operations.

The Employer states that:

> No Alcoa personnel were used to operate, service, or maintain the initial conveyor system employed by the Alabama State Docks. Alcoa personnel would only be involved with repairs to the Alcoa conveyors which were used to move bauxite in overland transportation once vessel discharge had been completed by the State Docks. Alcoa personnel may also be involved in maintenance of the barge loading facility and caustic dock on Alcoa premises. There was no evidence that Decedent worked on the caustic dock or the barge loading system.

At the hearing, Ray Hartwell, Jr., testified that he was employed at Alcoa's Mobile works from July 1945 to

February 1965, from September 1968 to October 1975, and from November 1978 until July 1995. (The major portion of the Alcoa plant was shut down in March 1982, and it was dismantled in 1985.) Mr. Hartwell, a former plant manager, described the facility and stated that vessels off loaded materials at the Alabama State Docks, adjacent to the Alcoa site.

If bauxite was destined for Alcoa, it was placed on conveyor "A" at the state docks and delivered to conveyor "B" which was primarily on Alcoa property. Conveyor "A" was eight feet above conveyor "B" and material dropped from A to B. Material from conveyor "B" was delivered to conveyor "C" where it was transferred to building 20 or building 22 where the bulk was then stored.

Buildings 20 and 22 had holes in the floor where bauxite could be dropped onto another conveyor for delivery to the grinding room. Mr. Hartwell testified that the State Docks also ran conveyor "A" in the opposite direction to unload materials for other customers.

Mr. Jones was considered to be a millright welder until 1978, and then this designation was changed to general mechanic. Mr. Hartwell testified that a millright welder spent less than one percent of his time in repairing conveyor systems. A general mechanic could spend up to two percent of his day involved in repairs to the caustic dock or the alumina dock. A 48-inch conveyor belt delivered material from the alumina silo to barges at the alumina dock. (TR 29-78)

Reginald House testified at the hearing that he worked at the plant from 1966 until 1982, and that he had been a millright helper and a general mechanic. Mr. House indicated that he had changed conveyor rollers, adjusted belts, and oiled rollers. (TR 82; CX 22)

In December 1995, depositions were taken of Henry Simon and Eddie Howard, Jr. (JX 1 and JX 2, respectively). See CX 25 and CX 26.

In *Garmon v. Alcoa*, 28 BRBS 28 (1994), the Board concurred that Mr. Garmon's bulldozing activities at the Mobile plant involved the movement of bauxite as part of the process of manufacturing aluminum, rather than as a part of the process of unloading bauxite from a vessel.

However, the Board remanded *Garmon, supra*, to consider testimony regarding the time he spent removing debris from the conveyor belts and placing on those belts the bauxite which had fallen from them. The Supreme Court has held that the status test focuses on the claimant's overall duties; thus, an employee is covered under the Act if he spends "at least some" of his time in loading and unloading. The Board indicated that the administrative law judge should determine whether the testimony establishes that claimant performed work on the conveyor belts which constituted part of the unloading process and which is covered under the Act.

The Benefits Review Board stated that in this case, however, the unloading process is complete when the bauxite is received for storage. It is not stored for further transhipment, but has reached its consignee and is stored to await use in the manufacturing process.

The record, at this time, indicates that neither an administrative law judge nor the Benefits Review Board has issued a subsequent decision in the case of *Garmon v. Alcoa.*

Mrs. Jones argues that her husband's maintenance of conveyor "B" meets the status requirement under the Longshore Act. Conveyor "A" is owned, operated, and maintained by the Port. Conveyor "A" was not attached to "B", and the former merely spilled material onto the latter for delivery to Alcoa storage area.

It is clear that Alcoa is not involved in the building or in the repairing of ships. Mr. Hartwell did testify that employees with Mr. Jones' job designation could spend about one percent of work time repairing conveyor "B".

There has been no suggestion in this case that Mr. Jones ever worked on the caustic dock or the alumina dock.

In *Northeast Marine Terminal Co. Inc. v. Caputo*, 432 U.S. 249 (1977), the Supreme Court stated that the Longshore Act covered workers who were involved in the essential elements of unloading a vessel-taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area.

The Supreme Court noted in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), that persons moving cargo directly from ship to land transportation are engaged in maritime employment. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985).

In *Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989), the Supreme Court stated that:

> Employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires. Coverage is not limited to employees who are denominated "longshoremen" or who physically handle the cargo. Nor are maintenance employees removed from coverage if they also have duties not integrally connected with the loading or unloading functions. Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed. Employees are surely covered when they are injured while performing a task integral to loading a ship.

In this case, there is no allegation that Mr. Jones ever worked on port authority machinery or was required to be on port property. Mr. Jones may have spent about one percent of his time repairing and maintaining conveyor "B" which belonged to Alcoa and was primarily on Alcoa property.

When bauxite spilled from conveyor "A" to conveyor "B", the bauxite was now in the possession of the ultimate user. Alcoa did not store and resell bauxite, but performed a manufacturing process that turned the bauxite into alumina.

The undersigned concludes that Mr. Jones' duties were not an integral part of vessel loading or unloading. In *Caputo, supra,* the Court stated that employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime commerce are not covered.

The port used conveyor "A" for functions which were not limited to the delivery of bauxite to Alcoa. For the above reasons, this administrative law judge finds that Mr. Jones' job was analogous to a truck driver as defined in *Caputo.*

Therefore, as Mr. Jones does not meet the definition of status under Section 2(3) of the Act, other considerations are moot in this case.

ORDER

The claim for death benefits under Section 9 of the Longshore and Harbor Workers' Compensation Act is DENIED.

SO ORDERED

/s/ Richard K. Malamphy
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/dlh
Newport News, Virginia